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February 12, 2019

VIA CM/ECF

Mark Langer
Clerk of the Court
U.S. Court of Appeals for the District of Columbia Circuit
333 Constitution Avenue NW
Washington, D.C. 20001

RE: *McKeever v. Whitaker*,
No. 17-5149 (D.C. Cir.)
Oral Argument Held on September 21, 2018

Dear Mr. Langer:

Pursuant to Federal Rule of Appellate Procedure 28(j), we write to inform the Court of the Eleventh Circuit's decision in *Pitch v. United States*. A copy of the opinion is attached.

Pitch addressed whether district courts have inherent authority outside the text of Federal Rule of Criminal Procedure 6(e) to release historically interesting grand jury materials. The Eleventh Circuit had previously concluded in *In re Petition to Inspect & Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261, 1268 (1984), that district courts have "inherent power beyond the literal wording of Rule 6(e)" to disclose grand jury materials. The majority in *Pitch* concluded that "we are bound by . . . *Hastings*," Slip. Op. 3, adopted the balancing test described in *In re Petition of Craig*, 131 F.3d 99 (2d Cir. 1997), Slip. Op. 10-11, and affirmed the district court's order to release the grand jury materials at issue.

Two members of the panel, however, explained their view that *Hastings* was wrongly decided and that district courts do not have inherent power to disclose grand jury records outside the text of the Rule. Slip Op. 16 (Jordan, J., concurring) ("I would have decided *Hastings* differently."); *id.* at 23 (Graham, J., dissenting) ("I . . . would hold that Rule 6(e) . . . limits a district court's authority to order the

disclosure of grand jury records."). For the reasons explained in our brief, Br. 15-37, we agree.

In addition, as the dissenting judge pointed out, "[t]hat an event has exceptional historical interest cuts both ways," raising questions about whether the possibility of future disclosure will affect "the conduct of a witness or grand juror involved in" a historically significant event or affect "the reputational interests . . . of future generations." Slip Op. 25-26 (Graham, J., dissenting). As our brief explains, Br. 37-45, balancing these competing interests reflects precisely the sort of policy judgment that Congress and the Supreme Court in its rulemaking capacity have made in crafting the exceptions to Rule 6(e), and is not an appropriate exercise of a district court's inherent authority.

Sincerely,

s/ Brad Hinshelwood
Brad Hinshelwood

Enclosures

cc: Counsel of Record (via CM/ECF)
Mr. Stuart McKeever (via First-Class U.S. Mail)